

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
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Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE CITY OF TULSA, et al.,)

Plaintiffs,)

-vs-)

TYSON FOODS, INC., et al.)

Defendants.)

CASE NO. 01-CV-900-EA ✓

TRANSCRIPT OF MOTIONS HEARING

HAD ON JANUARY 3, 2003

BEFORE THE HONORABLE CLAIRE V. EAGAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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EXHIBIT

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COPY

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1 trying to sell is basically the rule that says a bailor shall
2 not be liable to third parties for the negligent use of the
3 bail property by the bailee in the absence of control.

4 THE COURT: I know your argument.

5 MR. ROARK: Okay.

6 THE COURT: We don't have a negligence case.

7 MR. ROARK: That's right, we don't have a negligence
8 claim. It's a nuisance claim. And there is plenty of control,
9 as Mr. Kernan just went through here, to take it out of that
10 rule. So -- and it's not a bailment in the first place because
11 there's not a full transfer of possession of these chickens,
12 given all the control issues. So there's lots of reasons why
13 this is not a bailment and that argument doesn't apply.

14 THE COURT: Very well.

15 Okay. Mr. Tucker, are you going to address, does
16 Cargill want to argue any standing or right to bring -- just
17 one second. Are you going to address anything further that's
18 in the Cargill briefs?

19 MR. JOHN TUCKER: The Cargill brief, yes, ma'am. It's
20 actually separate from -- the Cargill brief raises two points
21 that haven't been addressed in the summary judgment motion --

22 THE COURT: Right.

23 MR. JOHN TUCKER: -- of the joint defendants.

24 THE COURT: Right. You're going to reserve separate
25 argument for that.

1 MR. TAYLOR: Well, Judge, I'm supposed to argue the
2 TMUA standing aspect.

3 THE COURT: All right. Let me hear your reply on --
4 let's not belabor the PSA.

5 MR. GRAVES: I won't, Judge. I just wanted to point
6 out that I didn't -- I want to point out again that I didn't
7 stand up here and say that the act --

8 THE COURT: You didn't.

9 MR. GRAVES: -- expressly says that or anything of
10 that nature, but given the act itself --

11 THE COURT: You said what he was going to say too.
12 You told me that he was going to argue that there's nowhere in
13 the act.

14 MR. GRAVES: Right. Given the act and the food safety
15 regulations and things of that nature, there are reasons for
16 these things that are in the contract that have to be there.

17 THE COURT: I understand.

18 MR. GRAVES: The other thing is on the Stevens case
19 that he brought up, the Tyson versus Stevens case, that case
20 related to swine, which is liquid manure first of all, which is
21 a completely different thing than dry poultry litter, and the
22 Packers and Stockyards Act did not apply to swine until this
23 summer. So there was a reason why that argument wouldn't have
24 been made in that particular case.

25 THE COURT: Thank you.

1 Mr. Taylor, it's your time.

2 MR. TAYLOR: Your Honor, if it please the Court, this
3 is the simplest to understand and the simplest to apply the
4 facts to the law, but it's often an area that courts are
5 reluctant to sustain because of the practical impact that
6 occurs.

7 TMUA does not own the water. The water is owned by
8 the State of Oklahoma. And as a result, TMUA nor the City, and
9 we'll let Mr. Tucker address that in a moment, have any
10 standing with which to bring this lawsuit.

11 This lawsuit is brought over a body of water, or
12 waters I should say, Spavinaw and Eucha, that are owned by the
13 State of Oklahoma and that have been appropriated to the City
14 since 1938.

15 Now, the TMUA does not have any employees. It is a
16 public trust without employees, income, or expenses. That's
17 from the former Mayor Susan Savage deposition and the Patsy
18 Bragg deposition. It has no income. Its funds are provided to
19 it by the City in an amount determined by the City Council.
20 That's from the Susan Savage deposition as well. And then
21 there's also language in the lease with the City that
22 references certain real properties, none of which are located
23 outside of Tulsa County in that particular reference to real
24 properties.

25 But the core of it, Judge, comes to this. Imagine

1 this hypothesis: In your private office you have, if I
2 remember correctly from your days as a magistrate, some very
3 eclectic personal items. Those belong to the Honorable Claire
4 Eagan personally.

5 THE COURT: Some of them.

6 MR. TAYLOR: Right. There are also items in your
7 personal office that are allocated to you as a judge. Those
8 are allocated to you either by the General Services
9 Administration or by the Justice Department or, as this video
10 screen says, U.S. Courts Oklahoma Northern District. Those are
11 allocated but they are not your ownership.

12 Imagine that there is painting going on in your
13 courtroom -- I'm sorry, in your office, and that in the course
14 of that painting that you contend that there is paint that has
15 gotten on your personal furniture and on that that is allocated
16 to you by the Justice Department or by GSA. You personally
17 have then an action against the painter, but you as the judge
18 do not have an allocation -- have an action against the painter
19 for what has been allocated to you. Only the entity that
20 actually owns that, which would be either General Services
21 Administration or the Justice Department, can bring that
22 action.

23 The same is true here. There is no consideration for
24 this allocation. The City of Tulsa and TMUA are political
25 subdivisions, and the State of Oklahoma has the ownership

1 interest. And so they are -- the TMUA, and as Mr. Tucker will
2 point out subsequently, the City of Tulsa are not the proper
3 entities, do not have the standing.

4 That puts you in a very difficult position, because if
5 you agree, you have to ultimately dismiss this case at this
6 stage of the game, which is a very tough thing to do. But it's
7 nevertheless what the facts applied to the law require you to
8 do.

9 THE COURT: What about the cases and the statutes
10 cited by the plaintiffs in their response?

11 MR. TAYLOR: Well, we think that the Okmulgee Coal
12 case versus Hinton says that the real party in interest is the
13 one legally entitled to the proceeds of a claim and that
14 because those damages were, in that case were borne by the
15 City, only the City is legally entitled. If this water is
16 damaged, the owner of it is the one that must bring this
17 action.

18 THE COURT: Under Oklahoma law, any person having a
19 right to the use of water from a stream whose right is impaired
20 by the act or acts of another or others may bring suit in
21 district court.

22 MR. TAYLOR: But, Judge, we believe that that is the
23 State of Oklahoma. Mr. Tucker is also going to address this
24 with regard to the City.

25 TMUA, though, is what I'm here to address first and

1 foremost. There has been no allocation of this water from the
2 state to the Tulsa Municipal Utility Authority. TMUA does not
3 have the standing to bring the action. Mr. Tucker will address
4 more specifically the City of Tulsa's claim.

5 THE COURT: Let's do TMUA then on behalf of the
6 plaintiffs.

7 MR. MCKINNEY: Your Honor -- pardon me. Do you want
8 to do that?

9 MR. ROARK: Some of this will apply to Mr. Tucker.
10 I'll wait and deal with some of that.

11 Of all the smoke screens that the defendants have
12 thrown up in this case, I have to say that these two arguments
13 that the TMUA and the City of Tulsa don't have a right to be in
14 this court to protect their own drinking water is the most
15 preposterous of any argument that they allege.

16 The TMUA, by lease agreement, and this is in Exhibit N
17 to our attachments to the brief, has the responsibility to own,
18 operate and protect all the assets of the water system in the
19 city of Tulsa. They have an interest and a legal obligation to
20 protect those rights. They contract to take care of the water
21 system, they incur indebtedness to take care of the water
22 system, and indeed they are the contracting party who incurred
23 many of the costs that are at issue in this case. They
24 contracted for the studies in the watershed. They run the
25 water treatment plan, if you will.

1 Now, they have incurred the \$4.1 million we're talking
2 about. I don't know what other kind of standing or interest a
3 party has to have to bring a lawsuit, but they've paid the
4 bills.

5 The idea about ownership I'm going to reserve, because
6 that's really probably more of what Mr. Tucker is going to talk
7 about, as to who owns the water. But if you follow the
8 defendants' argument to its conclusion, they would tell you
9 that only the State of Oklahoma has the standing in this state
10 to ever bring a nuisance claim for any pollution to any water
11 body in the state of Oklahoma because they own all the waters
12 of the state. Therefore, nobody else has a right to bring an
13 action in nuisance.

14 That's preposterous. The case law would not bear that
15 out. I don't know if they're suggesting that to you, but
16 that's the conclusion you reach.

17 It's also not the law with respect to what it takes to
18 bring a nuisance claim, both a private nuisance claim and a
19 public nuisance claim, but I'm going to wait and deal with that
20 after Mr. Tucker gives his presentation on this.

21 The example that Mr. Taylor gave you about the paint
22 damage in your office on property is a little different because
23 that would be an action for property damage, not a nuisance
24 action. And there's a big difference about who can bring a
25 nuisance action to protect the public's rights as well as your

1 own individual rights. Plenty of people besides the property
2 owner can bring an action for a nuisance, particularly a public
3 nuisance.

4 And again, I'm going to address that in a little more
5 detail after Mr. Tucker speaks. But the idea that the TMUA is
6 not a real entity and has no assets and is a hollow shell kind
7 of corporation and can't be in front of you in this court is
8 preposterous. They are a legal entity, a trust set up by law,
9 and they're doing what they're obligated to do, which is to
10 protect the water system that the defendants have polluted.

11 THE COURT: Thank you.

12 All right, Mr. Tucker.

13 MR. JOHN TUCKER: May it please the Court, Your Honor,
14 John Tucker for Cargill and the other defendants on the issue
15 of what does the City of Tulsa have a right to do and what do
16 they not have a right to do in this court.

17 It's undisputed that Tulsa does not own the water in
18 Spavinaw Lake or in Eucha Lake. It's undisputed and was
19 confirmed by a court proceeding in 1938 that Tulsa acquired an
20 allocation of an amount of water, an allocation of the right to
21 draw and to impound and draw and take water from Spavinaw
22 Creek. That allocation came to the City of Tulsa from the
23 State of Oklahoma. The allocation is as to quantity. No
24 reference is made in the allocation as to quality, merely as to
25 a quantity of water which can be taken each year.

1 The City of Tulsa essentially has a water right that
2 is a kind of right that is not a riparian right. It's not the
3 right to use the land -- the water that crosses your land for
4 purposes having to do with your land for domestic purposes. It
5 is a right that was beyond that and beyond a riparian right
6 that could only be obtained from the State of Oklahoma.

7 In the plaintiffs' response to our motion with regard
8 to standing, the quicksand that you can get into if you aren't
9 careful is set out at page 7 of their brief when they say in
10 the last paragraph, "Interference with water rights is plainly
11 an invasion of a legally protected interest." There's no
12 objection about that. Clearly, interference with water rights
13 is plainly an invasion of a legally protected interest.

14 They then say, "The common law of nuisance allows
15 recovery, embodied under Title 50, allows recovery of damages
16 for wrongful interference with one's use or enjoyment of rights
17 or interests in land." Your Honor, we're not dealing with a
18 right or an interest in land. We are dealing with a water
19 right. It's a property interest, but it's not a possessory
20 interest. It's not -- and I never was very good in Property I,
21 but I think this is what they called having to have a right
22 coupled with an interest.

23 They've got a right, but the right doesn't come from
24 their land; it comes from the State of Oklahoma. And the right
25 is limited to the right to take water. Here, Tulsa's protected

1 interest is the right to take water, which is not a possessory
2 interest. The City is not the riparian owner of that amount of
3 the water.

4 And I know Your Honor will recall from other briefing
5 that was presented in this matter the Department of
6 Environmental Quality charged the City of Tulsa with violations
7 having to do with its intentional discharge from its sewage
8 lagoons at Lake Eucha. The action that was brought by ODEQ was
9 to protect the waters of the state, which is Lake Eucha, and
10 that's where their authority came from to levy that charge.

11 And the whole point we're raising, whether you talk
12 about the City of Tulsa or TMUA, is that nothing is alleged
13 that the City's right to take water has been interfered with,
14 and there's no basis for any cause of action for interference
15 with the right to take water that was allocated to the City.

16 THE COURT: Thank you.

17 MR. JOHN TUCKER: Thank you.

18 THE COURT: Mr. Roark.

19 MR. ROARK: Your Honor, a fair reading of the permit
20 and order issued by the Oklahoma Resources Planning Board in
21 1938 cannot be read any other way but to say that the
22 appropriative rights that that gave the City of Tulsa to take
23 this water clearly gave it possession of the water, if it did
24 not give it title to the water. They have been using and
25 appropriating the water ever since.

1 The idea that there's some distinction between the law
2 that we cite under nuisance law that talks about possession of
3 land and what we're talking about here, water rights, they
4 don't cite any case law that draws this distinction, the
5 dichotomy between water and land and nuisance applies to land
6 but it doesn't apply to water.

7 The rights of -- this is both a private nuisance and a
8 public nuisance. The plaintiffs, to the extent they have a
9 private nuisance, they have a special interest because they've
10 incurred, the cities and TMUA have incurred the \$4.1 million.
11 That makes it a private nuisance. As to those entities, they
12 have paid the bill.

13 When you talk about private nuisance, the law is clear
14 and the Restatement is clear, the case law in Oklahoma is clear
15 that you don't have to have title. You can bring it with a
16 mere possessory interest. They don't quote any law to the
17 contrary. There is no law to the contrary. It's as old as the
18 law can be. So a mere possessory interest is sufficient to
19 bring a private nuisance.

20 When we talk about public nuisance, an action is
21 brought for the benefit of the public and you don't have to
22 bring -- you don't have to be the owner of the property to
23 bring a public nuisance. Indeed, the law is old, and there's
24 both Arkansas law we cite and Oklahoma law, that a municipality
25 is indeed the proper party to bring an action for a nuisance, a

1 public nuisance, that is injurious to the citizens of that
2 municipality.

3 That's what's going on here. The idea that the City
4 of Tulsa cannot bring a public nuisance action to protect its
5 citizens from its own public water drinking supply is
6 preposterous, it's absurd, but that's what the defendants are
7 suggesting.

8 We have rights under four statutes: the water law
9 rights under Title 82, the environmental laws under 27A, the
10 public nuisance laws under Title 50, the municipal law that we
11 brought a claim on that prevents the pollution of a public
12 water supply. All of those statutes give special rights to the
13 plaintiffs in this case to protect their water supply, and
14 there's simply no question but that they've got the right to be
15 plaintiffs in this case.

16 THE COURT: Thank you.

17 All right. Now do we want to go to Peterson, City of
18 Decatur, or any other issues that have been briefed?

19 MR. JOHN TUCKER: Joint and several liability was also
20 briefed in the joint motion for summary judgment. With the
21 Court's permission, I would like to address that.

22 THE COURT: Certainly.

23 MR. JOHN TUCKER: This matter began, as the Court will
24 recall, as an action that had a number of causes of action
25 alleged, one of which was negligence.